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7 | Attorneys for Defendant United States of America

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

19 Defendant, United States of America, by and through its undersigned attorneys, hereby  
20 answers Plaintiff's First Amended Complaint (the "Amended Complaint") on information and  
21 belief as follows:

## **JURISDICTION**

23        1. Neither admits nor denies the allegation in paragraph 1 of the Amended  
24      Complaint because it constitutes a legal conclusion to which no answer is required.  
25        2. Neither admits nor denies the allegation in the first sentence of paragraph 2 of the  
26      Amended Complaint because it constitutes a legal conclusion to which no answer is required.  
27      Admits the remaining allegations in paragraph 2 of the Amended Complaint.

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1                   INTRADISTRICT ASSIGNMENT

2       3. Neither admits nor denies the allegation in paragraph 3 of the Amended  
3 Complaint because it constitutes a jurisdictional allegation to which no answer is required.

4                   GENERAL ALLEGATIONS

5       4. Denies knowledge or information sufficient to form a belief as to the truth of the  
6 allegations in paragraph 4 of the Amended Complaint.

7       5. Admits the allegations in the first sentence of paragraph 5 of the Amended  
8 Complaint. Neither admits nor denies the remaining allegations in paragraph 5 of the Amended  
9 Complaint because they constitute conclusions of law to which no response is required and  
10 respectfully refers the Court to the statutes cited in paragraph 5 as the best statement of their  
11 contents.

12      6. Denies the allegation in paragraph 6 of the Amended Complaint except admits  
13 that defendant operates an Outpatient Clinic and Center for Rehabilitation and Extended Care  
14 ("CREC"), a licensed long term care facility for veterans in Martinez, California.

15      7. Admits the allegation in the first sentence of paragraph 7 of the Amended  
16 Complaint. Denies knowledge or information sufficient to form a belief as to the truth of the  
17 remaining allegations in paragraph 7 of the Amended Complaint regarding Ralph Immediato's  
18 medical history and respectfully refers the Court to Mr. Immediato's medical records as the best  
19 statement of his medical condition.

20      8. Admits the allegations in paragraph 8 of the Amended Complaint.

21      9. Admits the allegations in paragraph 9 of the Amended Complaint.

22      10. Denies the allegations in paragraph 10 of the Amended Complaint.

23      11. Denies the allegations in paragraph 11 of the Amended Complaint except admits  
24 that Ralph Immediato died on July 29, 2004.

## **FIRST CAUSE OF ACTION**

[Professional Negligence]

3           12. Defendant restates each and every response set forth above in paragraphs 1  
4 through 11 as if fully set forth herein.

5        13. Neither admits nor denies the allegations in paragraph 13 of the Amended  
6 Complaint because they constitute legal conclusions to which no answer is required.

7        14. Neither admits nor denies the allegations in paragraph 14 of the Amended  
8 Complaint because they constitute legal conclusions to which no answer is required.

9 15. Denies the allegations in paragraph 15 of the Amended Complaint.

16. Denies the allegation in paragraph 16 of the Amended Complaint.

11 17. Denies the allegation in paragraph 17 of the Amended Complaint.

**SECOND CAUSE OF ACTION**

[Wrongful Death]

14        18. Defendant restates each and every response set forth above in paragraphs 1  
15 through 17 as if fully set forth herein.

19. Denies the allegation in paragraph 19 of the Amended Complaint.

17 20. Denies the allegation in paragraph 20 of the Amended Complaint.

18 21. Denies the allegation in paragraph 21 of the Amended Complaint.

### THIRD CAUSE OF ACTION

## [Survival]

21       22. Defendant restates each and every response set forth above in paragraphs 1  
22 through 21 as if fully set forth herein.

23 23. Denies the allegations in paragraph 23 of the Amended Complaint.

24. Denies the allegation in paragraph 24 of the Amended Complaint.

1    FOURTH CAUSE OF ACTION

2    [Elder Abuse]

3         25.      Defendant restates each and every response set forth above in paragraphs 1  
4 through 24 as if fully set forth herein.

5         26.      Neither admits nor denies the allegation in paragraph 26 of the Amended  
6 Complaint because it constitutes a legal conclusion to which no response is required and  
7 respectfully refers the Court to the provision of the statute cited in paragraph 26 as the best  
8 statement of its contents.

9         27.      Denies the allegation in paragraph 27 of the Amended Complaint except admits  
10 that during his stay at the CREC in Martinez Ralph Immediato was defendant upon defendant for  
11 his care.

12         28.      Neither admits nor denies the allegation in paragraph 28 of the Amended  
13 Complaint because it constitutes a legal conclusion to which no answer is required except  
14 expressly denies that defendant's care of Mr. Immediato failed to conform to the standard of care.

15         29.      Denies the allegation in paragraph 29 of the Amended Complaint.

16         30.      Denies the allegation in paragraph 30 of the Amended Complaint.

17         31.      Denies the allegation in paragraph 31 of the Amended Complaint.

18         32.      Neither admits nor denies the allegation in paragraph 32 of the Amended  
19 Complaint because it constitutes a legal conclusion to which no answer is required. To the extent  
20 an answer is required, defendant denies the allegation in paragraph 32 of the Amended  
21 Complaint.

22    The paragraph beginning with "WHEREFORE" contains plaintiff's prayer for relief. To  
23 the extent that an answer is required, all allegations contained in the prayer for relief are denied.

24    Any allegation set forth in the Amended Complaint not heretofore answered is  
25 specifically denied.

1                   FIRST AFFIRMATIVE DEFENSE

2         This Court lacks subject matter jurisdiction over plaintiff's claims.

3                   SECOND AFFIRMATIVE DEFENSE

4         The Complaint fails to state a claim upon which relief can be granted.

5                   THIRD AFFIRMATIVE DEFENSE

6         The United States, through its employees and agents, acted with due care and diligence,  
7         in conformity with the applicable standard of care, at all relevant times.

8                   FOURTH AFFIRMATIVE DEFENSE

9         No acts or omissions by the United States were the proximate cause of any injury to the  
10       plaintiffs.

11                  FIFTH AFFIRMATIVE DEFENSE

12         Plaintiffs' recovery, if any, is limited to the amount sought administratively. 28 U.S.C. §  
13       2675(b).

14                  SIXTH AFFIRMATIVE DEFENSE

15         In the event the United States is found to have been negligent, which negligence is  
16       denied, the superseding and intervening negligence of third parties, for whom the United States  
17       cannot be held liable, broke any causal connection between the United States' negligence and the  
18       plaintiff's alleged injury, cutting off the legal effect of the United States' negligence.

19                  SEVENTH AFFIRMATIVE DEFENSE

20         To the extent that the common or statutory law of the State of California, where the  
21       alleged acts or omissions occurred, limits or reduces damages or limits a private defendant's  
22       liability or plaintiffs' cause of action, that law applies in this action against the United States to  
23       the extent that it is not inconsistent with the Federal Tort Claims Act.

24                  EIGHTH AFFIRMATIVE DEFENSE

25         In the event plaintiff is entitled to recover damages from the United States in this action,  
26       the United States is entitled to a set-off or credit for any past or future benefits paid to or on

1 behalf of or received by plaintiff from any federal agency program to the extent allowed under  
2 federal and state common law and statutory law.

## NINTH AFFIRMATIVE DEFENSE

4 Plaintiffs cannot recover punitive damages or any other non-compensatory damages  
5 against the United States. 28 U.S.C. § 2674.

**TENTH AFFIRMATIVE DEFENSE**

7 Plaintiffs are not entitled to the recovery of pre-judgment interest on any award they may  
8 obtain from the United States. 28 U.S.C. § 2674.

## ELEVENTH AFFIRMATIVE DEFENSE

10 In the event that this Court finds the United States is liable to plaintiffs and enters a  
11 monetary judgment against the United States, plaintiffs are entitled to post-judgment interest only  
12 to the extent provided by law.

## TWELFTH AFFIRMATIVE DEFENSE

14 Costs may be taxed against the United States only as allowed by 28 U.S.C. § 1920.

## THIRTEENTH AFFIRMATIVE DEFENSE

16 Plaintiff's damages are limited to the damages recoverable under the Federal Tort Claims  
17 Act, 28 U.S.C. §§ 1346(b); 2671 *et seq.* Attorney's fees are taken out of any judgment and are  
18 governed by the statute. 28 U.S.C. § 2678.

## FOURTEENTH AFFIRMATIVE DEFENSE

To the extent plaintiff may have failed to mitigate her damages, her recovery, if any, must be reduced accordingly.

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1 WHEREFORE, having fully answered the Amended Complaint against it, the United  
2 States respectfully prays that this Court enter judgment in its favor and against plaintiff, award it  
3 costs, and grant such other and further relief as this court deems just and equitable.

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5 Dated: October 1, 2007

6 Respectfully submitted,

7 SCOTT N. SCHOOLS  
United States Attorney

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9 By: /s/  
10 ELLEN M. FITZGERALD  
Assistant United States Attorney